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In The

Supreme Court of the United States

October Term, 1992

ROBERT J. BYKOWICZ, E. ANNE BYKOWICZ, PATRICK J. ROURKE, TERRY L. ROURKE, WALTER E. ALLEN, PAULA J. ALLEN, JERRY R. ANDERSON, LINDA G. ANDERSON, PATRICK W. KLEM, JANET T. KLEM, SIDNEY W. McARTHUR, and MARY JEAN McARTHUR,

Petitioners,

vs.

ICM MORTGAGE CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that ICM was entitled to judgment as a matter of law on Petitioners' gross negligence claim.

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FOREWORD

Citations to materials in the district court record on appeal are denoted by the notation "R." and the volume and page number in the district court record where the cited material appears. Citations to material in the trial transcript are denoted by the notation "Tr." and the volume and page number where the cited material appears. Citations to the transcripts of post-trial hearings are to the record volume and the page number of that particular transcript.

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ROBERT J. BYKOWICZ, E. ANNE BYKOWICZ, PATRICK J. ROURKE, TERRY L. ROURKE, WALTER E. ALLEN, PAULA J. ALLEN, JERRY R. ANDERSON, LINDA G. ANDERSON, PATRICK W. KLEM, JANET T. KLEM, SIDNEY W. McARTHUR, and MARY JEAN McARTHUR,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

In addition to the constitutional provision cited by Petitioners, this case also involves FED. R. CIV. P. 50.

SUMMARY OF THE ARGUMENT

There is no reason to grant writ of certiorari to review the Court of Appeals' faithful application of settled precedent in the context of this case.

1. The standard of review enunciated in *Boeing Co. v. Shipman* and utilized by the Fifth Circuit is correct and does not conflict with any firmly established position of any other Court of Appeals.

2. Petitioners have either waived or invited error as to any claim that the Fifth Circuit's use of the *Boeing Co. v. Shipman* standard of review is either unconstitutional or in conflict with the decisions of other Courts of Appeals.

3. The decision below is consistent with decisions of this Court and does not directly conflict with any applicable decision of this Court.

4. The Fifth Circuit's ruling does not result in a violation of the Petitioners' Seventh Amendment rights.

5. Petitioners' asserted error applies to only one of the three grounds upon which the Fifth Circuit granted ICM judgment as a matter of law and the other grounds are a sufficient basis for upholding the judgment.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Courts Below.

The Plaintiffs are six couples who purchased homes in the Houston area from Pulte Home Corporation ("Pulte") and financed those homes through ICM Mortgage Corporation ("ICM"), a Pulte subsidiary. Plaintiffs originally brought this action against Pulte and ICM on their own behalf and purporting to act on behalf of a class of individuals similarly situated, asserting violations of Texas Business & Commerce Code, § 27.01 ("statutory fraud"), TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987), the Texas Deceptive Trade Practices-Consumer Protection Act (the "DTPA"), TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* (Vernon 1987), and common law theories of negligence and gross negligence.[1] Each of these claims was based on Pulte's inclusion of a current year property tax estimate in a marketing document entitled "Investment Quotation." *See* Pretrial Order, R. at 5:2435-36. Plaintiffs sought actual and punitive damages or alternatively, rescission of their home purchase contracts. *See* Third Amended Complaint, R. at 6:1937-59.

The District Court denied without review Defendants' Motions for Directed Verdict, Judgment Notwithstanding the Verdict, and New Trial, and based on the jury's findings, entered Judgment for the Plaintiffs

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[1] The case was initially filed in Texas state district court. Pulte and ICM removed the case under 28 U.S.C. § 1332(a)(1) (1966) to the United States District Court for the Southern District of Texas, Houston Division. R. at 16:148.

against Pulte under § 27.01 and against ICM alternatively under § 27.01 and/or for gross negligence. Appendix B to Petitioners' Writ of Certiorari ("Petitioners' Appendix B"). *See also* Tr. at 7:4; 10:9. The judgment included damages for the difference between the property taxes actually paid to time of trial and the amounts described in the Investment Quotations (multiplied by the number of years to trial), out-of-pocket expenses, mental anguish, and punitive damages.[2] Petitioners' Appendix B at 3-14. After post-trial hearings, the District Court awarded attorneys' fees of $385,565.94, including substantial sums for work on Plaintiffs' unsuccessful class certification effort. Petitioners' Appendix B at 14. *See generally* R. at 35:7-17.

The Court of Appeals held that, as a matter of law, the tax estimates found in Petitioners' Investment Quotations were not actionable representations of fact under § 27.01 and that ICM was entitled to judgment as a matter of law on the gross negligence claim because there was no breach of duty, no cause in fact of damages and implicitly no foreseeability of injury, as a matter of law. The Court of Appeals based its decision on its prior examinations of the standard of appellate review of jury findings in *Granberry v. O'Barr*, 866 F.2d 112, 113 (5th Cir. 1988), and *Western Co. of North Am. v. United States*, 699 F.2d 264, 276 (5th Cir.), *cert. denied*, 464 U.S. 892 (1983).

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[2] The jury's cumulative findings were as follows: (1) Tax Differential – $8,940.74, (2) Out-of-Pocket – $39,767.97, (3) Mental Anguish – $70,000, and (4) Exemplary Damages – $1.35 million. Petitioners' Appendix B at 3-14.

II. Statement of Facts.

This case involves the claims of six couples who purchased homes from Pulte and who financed those homes through ICM in 1983 and 1984. *See* Admissions of Fact, Pretrial Order, R. at 5:2440-4. Early in each Plaintiff's dealings with Pulte, upon their expression of interest in a particular home, Pulte personnel prepared a one-page form entitled "Investment Quotation" which contained information about the price of the home being considered and estimates of the monthly escrow payments on items including insurance, maintenance and likely current year taxes for that home. Tr. at 4:16-17; 7:36-37. *See also* Plaintiffs' Exhs. 12, 15, 19, 23, 26, 28. The tax estimate in each Investment Quotation is the sole purported basis of all of the Plaintiffs' claims. Conspicuously noted on each Investment Quotation a few inches from the "Taxes" entry is this disclosure:

> INFORMATION IS ESTIMATED AND BASED ON CURRENT PRICES AND INTEREST RATES, WHICH ARE SUBJECT TO CHANGE WITHOUT NOTICE. TAXES AND INSURANCE ARE ESTIMATED.

Plaintiffs' Exhs. 12, 15, 19, 23, 26, 28. The Investment Quotations ("IQ's") were not part of any agreement or contract, but were used as a marketing device to outline possible housing costs for the year of purchase. Subsequently, each Plaintiff entered into a separate purchase contract with Pulte. Tr. at 8:18-29.

The amounts included in the "Taxes" blank on each IQ were drawn from charts prepared and used by ICM to calculate tax escrows for its mortgage accounts. These

tables were prepared either by the Federal Housing Administration ("FHA") or Stephen G. Harshfield ("Harshfield"), who at the time was an officer of ICM. Tr. at 7:37-39, 42.[3]

Harshfield prepared the tables from which the tax estimates were taken by comparing FHA tables and actual appraisal data on similar properties. Tr. at 7:50-51, 54-57, 59-63. Applying this information to his determination of the probable appraised value of the properties in question, Harshfield estimated then current taxes for homes with various purchase prices in various Pulte neighborhoods. Tr. at 7:53-54. *See* Tables, Plaintiffs' Exhibit 1. These figures were used by ICM for loan qualification purposes and to estimate the escrow amounts necessary to pay property taxes on homes financed by ICM. Tr. at 7:47, 66. As a convenience to Pulte, these estimates were also communicated to Pulte personnel who used them in the IQ's. Tr. at 7:50.

Each Plaintiff couple elected to finance their Pulte home through ICM. *See* Admissions, R. at 5:2441. Plaintiffs were free to arrange financing with any other company. Tr. at 7:32-33. The first contact between ICM and the Plaintiffs came during the financing negotiations. At closing, ICM gave each Plaintiff couple a document regarding "future property taxes" and their monthly tax escrow

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[3] The tax estimates for the McArthurs, the Bykowiczes, and the Rourkes were taken from charts prepared by the FHA, and communicated to Pulte by ICM. The Allens', the Klems', and the Andersons' IQ's included tax estimates based upon Harshfield's updating of the FHA charts. *See* Plaintiffs' Exhibit 1.

payments. Defendants' Exhs. 6, 25, 35, 58, 73, 84. *See* Tr. at 2:217; 4:141-43, 186-87; 5:40, 132-36; 6:56, 69-70, 96-97, 144-45, 153-55. This document is entitled "*ICM IMPORTANT NOTICE CONCERNING FUTURE PROPERTY TAXES AND MAINTENANCE FEES*" (the "Important Notice") (emphasis in original). Each Plaintiff received and signed a copy of the "Important Notice" at closing acknowledging his or her receipt of this document. It provides in relevant part:

> Your monthly payment reflects a deposit in your escrow account on the basis of *estimated* improved property taxes. At the beginning of next year, your property will be reevaluated and your taxes computed on that reevaluation. Your monthly payments for . . . [next year] may or may not reflect a tax increase based on that reevaluation.

Defendants' Exhs. 6, 25, 35, 58, 73, 84 (emphasis added). There is no dispute that all of the Plaintiffs received this document at closing, nor is there any dispute about its contents or the authenticity of the Plaintiffs' signatures affixed thereto. No Plaintiff challenged the statements in their Important Notice at the time of closing.

There was no evidence at trial that the amounts escrowed or the amounts identified on the IQ's were insufficient to meet the tax burden on each home in the year of purchase. However, at least one year following the purchase of each home, consistent with the Important Notice, each family received notification from ICM that

the prior year's tax escrows[4] were insufficient to fully pay property taxes incurred that year. *See, e.g.*, Tr. at 4:84, 85-86. *See also* Plaintiffs' Exhs. 13, 16, 20, 24, 27, 29. ICM, having paid the property taxes in full, permitted the Plaintiffs to repay ICM over a period of time of up to two years. *Id.* In addition, in order to prevent future shortages, ICM increased the regular monthly escrow payments accordingly. *Id.* Plaintiffs' objections to these changes initiated the dispute which led to this lawsuit.

REASONS FOR DENYING THE WRIT

Respondent ICM Mortgage Corporation respectfully opposes the Petition for Writ of Certiorari in this case because: 1) the ruling of the Court of Appeals on the narrow issue involved in this case is correct based upon proper review standards and does not create any true conflict among the circuits or conflict with any applicable authority from this Court, and 2) the points asserted by Petitioners ignore independently dispositive portions of the Court of Appeals' decision.

[4] For those who purchased their homes in 1983, notices were received in 1985 regarding amounts escrowed for 1984 taxes. For those who purchased their homes in 1984, notices were received in 1986 regarding amounts escrowed for 1985 taxes.

I. The Standard of Review Enunciated in *Boeing Co. v. Shipman* and Utilized by the Fifth Circuit is Correct and Does Not Conflict With Any Firmly Established Position of Any Other Court of Appeals.

Petitioners assert that the court erred by applying the following standard of review enunciated in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969):

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 374-75. Petitioners contend that because the Fifth Circuit standard of review permits the Court to examine all the evidence, even with all inferences and conflicts resolved in favor of the non-movant, there is a resulting conflict among the courts of appeals. However, a review of the authorities cited in support of such a conflict reveals that there is no meaningful conflict worthy of review by certiorari. *Boeing* is clearly the majority rule[5] and may very well be the unanimous standard.

A. Eighth Circuit.

The principal decision relied upon by Petitioners is *Dace v. ACF Industries*, 722 F.2d 374 (8th Cir. 1983), *on rehearing*, 728 F.2d 976 (8th Cir. 1984). Incredibly, Petitioners never once acknowledge the existence of the subsequent opinion on rehearing. This is particularly remarkable because in that second opinion the Eighth Circuit acknowledges that in a prior matter: "[W]e *did* consider evidence provided by employees of the defendant in deciding to affirm a directed verdict granted by the District Court." *Dace*, 728 F.2d at 977 (emphasis added) (citing *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983)). The *Dace* Court went on to note that the issue was such that en banc review by the entire Eighth Circuit might be appropriate, but refused to order such review. *Dace*, 728 F.2d at 978. This issue has never been resolved by Eighth Circuit en banc review. *Dace* created a conflict within the Eighth Circuit, not a conflict between circuits.

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[5] *See infra* pp. 12-14.

Further, an examination of recent Eighth Circuit authority reveals that the standard enunciated in *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368, 1371 (8th Cir. 1989), is now the controlling view. There it was noted that reversal of a jury verdict was appropriate if:

> [a]ll of the evidence points one way and is susceptible of no reasonable inferences sustaining the position of [plaintiffs]. Furthermore, we must *resolve direct factual conflicts* in favor of [plaintiffs], assume as true all facts in [plaintiffs'] favor which the evidence tends to prove, and give [plaintiffs] the benefit of all reasonable inferences.

Id. (citations omitted) (emphasis added). *See also Doe by Doe v. B.P.S. Guard Services*, 945 F.2d 1422 (8th Cir. 1991). Clearly if the court must "resolve direct factual conflicts" it is reviewing all the evidence, otherwise there is no need to address how conflicts are to be treated. At most there is a conflict within the decisions of the Eighth Circuit which that court must itself resolve. However, one could also easily interpret *Robertson Oil* and its progeny as the Eighth Circuit's current adherence to the majority view.

B. First Circuit.

Petitioners also assert that the First Circuit Court of Appeals has adopted a standard inconsistent with *Boeing* resulting in a conflict to be resolved by this Court. Again, a closer examination of First Circuit precedent reveals no meaningful conflict at all. The First Circuit, and on rare occasions other circuit courts, apply the reasonable juror

standard in a slightly more stringent manner by considering evidence of the non-movant and uncontradicted and unimpeached testimony of all other disinterested witnesses. *See Layne v. Vinzant*, 657 F.2d 468, 472 (1st Cir. 1981). This alleged conflict is, in effect, an application of the principle that all inferences are to be drawn in favor of the verdict. It does not reflect any meaningful distinction from the *Boeing* standard, and given that Harshfield was no longer employed by the defendants below and was not himself a defendant, his testimony could very well fall within the First Circuit's permissible scope of review. Further, it can hardly be disputed that the Petitioners' IQ's and Important Notices would be properly considered under the First Circuit's standard. Given that the Fifth Circuit based its ruling on these uncontested documents, any potential conflict with *Boeing* is of no consequence in the present case.

C. Position of the other circuits.

The *Boeing* standard or a similar one has been adopted by and/or cited authoritatively by either the Courts of Appeals or district courts of virtually every other circuit.[6]

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[6] The following cases either adopt *Boeing* specifically or implicitly follow a "review all of the evidence" standard:

Court of Appeals for the District of Columbia

Boutros v. Riggs Nat'l Bank, 655 F.2d 1257 (D.C. Cir. 1981)

(Continued on following page)

In further support of their claim of a conflict, Petitioners rely upon Justice White's dissent to the denial of

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Second Circuit Court of Appeals

Schwimmer v. Sony Corp. of Am., 677 F.2d 946, 952 (2nd Cir.) *cert. denied*, 459 U.S. 1007 (1982); *H.L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 940-41 (2nd Cir. 1981), *cert. denied*, 459 U.S. 880 (1982).

Third Circuit Court of Appeals

Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205, 1212 n. 7 (3rd Cir. 1970). *See also Black v. Stephens*, 662 F.2d 181, 187 (3rd Cir. 1981) (calling for courts to "review the record").

Fourth Circuit Court of Appeals

Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242-43 (4th Cir. 1982); *Grooms v. Minute-Maid*, 267 F.2d 541, 543 (4th Cir. 1959).

Sixth Circuit Court of Appeals

Morelock v. NCR Corp., 586 F.2d 1096, 1104-05 (6th Cir. 1978) (acknowledging that the court should consider "the evidence").

Seventh Circuit Court of Appeals

Panter v. Marshall Field & Co., 646 F.2d 271, 281 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981). *See also Hughes v. Conticarriers & Terminals, Inc.*, 753 F. Supp. 221, 223 (N.D. Ill. 1990).

Eighth Circuit District Court (W.D. Arkansas)

Nunes v. Bishop Aviation, Inc., 703 F. Supp. 774, 776 (W.D. Ark. 1988).

(Continued on following page)

certiorari in *Schwimmer v. Sony Corp. of Am.*, 459 U.S. 1007, 1008-09 (1983) (White, J., dissenting). At that time, Justice White noted what he perceived to be a conflict among the Courts of Appeals regarding the standard of review of a jury verdict, or order removing a matter from the jury. However, as demonstrated previously, the *Boeing* standard has either tacitly or specifically been adopted by virtually every Court of Appeals. In addition, the fact that those Courts of Appeals did not re-examine the issues reviewed and discussed at length in *Boeing* does not, as asserted by Petitioners, reflect a failure to examine the issue, but rather evidences an acceptance of the well-reasoned discussion by the Fifth Circuit.

(Continued from previous page)

Ninth Circuit Court of Appeals

United California Bank v. THC Fin. Corp., 557 F.2d 1351, 1356 (9th Cir. 1977).

Tenth Circuit Court of Appeals

Downie v. Abex Corp., 741 F.2d 1235, 1238 (10th Cir. 1984); *Wilkins v. Hogan*, 425 F.2d 1022, 1024 (10th Cir. 1970).

Eleventh Circuit Court of Appeals

Picker Int'l v. Parten, 935 F.2d 257, 260 (11th Cir. 1991); *Neff v. Kehoe*, 708 F.2d 639, 641-42 (11th Cir. 1983).

Federal Circuit Court of Appeals

Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1546 (Fed. Cir. 1983).

II. Petitioners Have Either Waived or Invited Error as to Any Claim That the Fifth Circuit's use of the *Boeing Co. v. Shipman* Standard of Review is Either Unconstitutional or in Conflict With the Decisions of Other Courts of Appeals.

Remarkably, the precise standard set out in *Boeing Co. v. Shipman* was the one requested by the Petitioners in their original Reply Brief in the Court of Appeals and the standard again reasserted in their Motion For Rehearing. The relevant portions of these prior pleadings by Petitioners are included herein as Appendices A and B. Until now, Petitioners have taken the position that, "[i]n reviewing the evidence to apply this standard, *the Court must consider all the evidence* and draw all reasonable conclusions and inferences in favor of the Appellees. . . ." Brief of Appellees, p. 25 (Appendix A) (emphasis added). After the issuance of the Fifth Circuit's opinion, Petitioners asserted for the first time that "[t]he Court [of Appeals] also contradicts established principles in applying these standards by failing to consider *all* of the evidence or to do so in the light and with all reasonable inferences most favorable to [the Homeowners]." Petition for Rehearing, p. 4 (Appendix B) (citing *Boeing*, 411 F.2d at 374).

The record is thus clear that Petitioners demanded that the Court of Appeals apply the *Boeing* standard. They cannot now be heard to complain because the application of the standard they requested doomed their claims. *See Law v. United States*, 266 U.S. 494, 496 (1925); *Capella v. Zurich General Acc. Liability Ins. Co.*, 194 F.2d 558, 560 (5th Cir. 1952). *See also United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606 (5th Cir. 1991). Given

Petitioners' prior inconsistent position, their assertion at this late date that the very standard they argued for is in conflict with the decisions of other circuits, this Court, and the Seventh Amendment should not be considered. The Petition should be denied.

III. The Decision Below is Consistent With the Decisions of This Court and Does Not Directly Conflict With Any Applicable Decision of This Court.

Petitioners argue that the decision of the Court of Appeals, and indeed the entire *Boeing* standard of review, is in fatal conflict with prior decisions of this Court. They are simply wrong.

A. The *Boeing* standard is consistent with this Court's recent holding in *Anderson v. Liberty Lobby*.

While Petitioners make much of older authority from this Court, the vast majority of which is taken out of context, Petitioners ignore the impact of this Court's more recent holding in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).[7] In *Liberty Lobby* this Court recognized that the standard of review in summary judgment cases under FED. R. CIV. P. 56(c) "mirrors the standard for directed

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[7] It should be noted that Justice White's dissent to the denial of certiorari in *Schwimmer v. Sony Corp. of Am.*, 677 F.2d 946, 952 (2nd Cir.), *cert. denied*, 459 U.S. 1007 (1982), predates and thus does not consider the impact of this decision. Further, Justice White does not assert a conflict with Supreme Court precedent in his analysis.

verdict" under FED. R. CIV. P. 50(a), "which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Liberty Lobby*, 477 U.S. at 250. This Court went on to note that the inquiry in either summary judgment or directed verdict "is the same: whether *the evidence* presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-52 (emphasis added). Clearly this Court contemplated in this statement of the rule that *all* of the evidence must be reviewed. Otherwise there is no way to determine if a "sufficient disagreement" exists or if the evidence is "one-sided." Petitioners' assertion that only the non-movant's proof is to be considered in this analysis is inconsistent with this Court's enunciated standard for *both* summary judgment and judgments as a matter of law.

The *Boeing* standard of review however, is wholly consistent with *Liberty Lobby* and its progeny and the dictates of Rule 50(a). It is Petitioners' proposed standard that is not. Indeed, in one of the more recent cases cited by Petitioners, it is clear this Court did review all the evidence when addressing the propriety of summary judgment. *See Masson v. New Yorker Magazine, Inc.*, ___ U.S. ___, 111 S. Ct. 2419, 2435-37 (1991).[8] The portion of that

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[8] *Masson* involved a libel action where conversations between the Plaintiff and a reporter had partially, but not completely, been tape recorded. Published statements differed in some respects from the tapes and the plaintiff asserted these alterations were malicious and false. 111 S. Ct. at 2424-28.

opinion relied upon by Petitioners deals solely with the indisputable concept that where there is directly conflicting evidence in the judgment, as a matter of law conflicts will be resolved in favor of the non-movant. *Id.* at 2435-37. This does not mean that the Court must ignore all evidence proffered by the movant.[9] That is not the holding of *Masson* and would be inconsistent with *Liberty Lobby*. Indeed, were this Court to have followed Petitioners' proposed standard when deciding *Masson*, it could not have reviewed the audiotapes in question because Masson testified he never made the statements attributed to him. Under Petitioners' proposed standard no other evidence could be considered, clearly leading to a ridiculous result.

B. This Court's decision in *Wilkerson v. McCarthy* has no application in the current context and creates no conflict with *Boeing*.

Petitioners cite *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), more than any other decision because it is the purported basis of the *Dace* decision distinguished previously, *supra* at 10. *Wilkerson* is, however, the easiest authority to distinguish because it deals with a claim under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1986).

As noted in *Boeing*, in FELA cases federal courts are prohibited from overturning jury verdicts unless "there is

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[9] The evidence rejected by this Court in *Masson* consisted of purported notes of conversations as to which authenticity was disputed. *Masson*, 111 S. Ct. at 2428.

a *complete absence* of probative facts to support the conclusion reached." 411 F.2d at 370 (quoting *Planters Mfg. Co. v. Protection Mut. Ins. Co.*, 380 F.2d 869, 874 (5th Cir. 1967)). *Planters* was based on this Court's holding in *Lavender v. Kurn*, 327 U.S. 645 (1946), an FELA case recognizing what has since been called the "slight negligence" standard. *See Rogers v. Missouri P.R.R.*, 352 U.S. 500, 506 (1957). As noted by the Eighth Circuit, in FELA cases, unlike the case at bar, "the jury's power to engage in inferences must be recognized as being significantly broader than in common law negligence actions." *Chicago, Rock Island & P.R.R. v. Melcher*, 333 F.2d 996, 999-1000 (8th Cir. 1964). Stated simply, the FELA "scintilla of evidence" rule enunciated in *Wilkerson* has no application outside of that statute and its companion statute, the Jones Act. Petitioners' attempt to attack *Boeing* by reference to *Wilkerson* cannot withstand reasoned review.

C. Other Supreme Court authority cited by Petitioners creates no conflict.

The remaining authorities cited by Petitioners which they assert mandate reversal of *Boeing* are equally innocuous, and largely antique.[10] A review of these cases reveals that Petitioners have either grossly misrepresented those holdings to this Court or failed to recognize

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[10] Petitioners note these principal cases: *Hepburn v. Dubois*, 37 U.S. 743 (1838); *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U.S. 405 (1894); *Gunning v. Cooley*, 281 U.S. 90 (1930); *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949); and *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), which purport to require the overturning of *Boeing*.

the clear factual and legal distinctions that exist between those cases and the case at bar.

1. *Hepburn v. Dubois.*

Petitioners assert that *Hepburn* renders the Fifth Circuit's consideration of Harshfield's testimony erroneous. In fact, Petitioners take one brief passage from this Court's 1838 opinion completely out of context. In *Hepburn*, this Court was reviewing a jury verdict in favor of the plaintiff seeking to quiet title in her favor to a tract of land. 37 U.S. at 345-47.

This Court reviewed the sufficiency of the evidence, stating that:

> [A]fter a verdict in favor of either party on the evidence, he has a right to demand of a court of error that they look to the evidence only for one purpose, with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case.

Id. at 376. In other words, this Court recognized that the appellate court must look to the entire evidentiary record for the purpose of determining whether the evidence is insufficient as a matter of law to support the jury's findings.

Hepburn goes on to note that once the Court concludes that the evidence is sufficient, the court must then base its judgment on the facts legally inferable from the evidence supporting the jury verdict. *Id.* Petitioners quote this second portion of the *Hepburn* decision, ignoring the

fact that this Court earlier implicitly recognized that the initial evidentiary review includes the entire record.

2. *Gunning v. Cooley* and *Corinne Mill, Canal & Stock Co. v. Toponce*.

It is intriguing that Petitioners discuss *Corinne Mill* (1894) simultaneously with *Gunning* (1930), a case decided thirty-five years later, and thus presumably somewhat more persuasive. In *Gunning*, this Court upheld a Court of Appeals decision that the evidence was sufficient to support a jury finding of negligence. 281 U.S. at 97-98. Initially, this Court noted that in order to be sustained, a jury verdict must be supported by more than a mere scintilla of evidence. 281 U.S. at 94. Then Justice Butler noted: "Where uncertainty as to the existence of negligence arises *from a conflict in the testimony* or because, the facts being disputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." 281 U.S. at 94 (emphasis added). This statement is then followed by a lengthy discussion of the evidence both from the Plaintiff and the Defendant. 281 U.S. at 95-98. *Gunning*'s enunciation of the long standing reasonable juror standard does not doom *Boeing*. On the contrary, *Gunning* is simply the natural corollary to the case at bar. If there is sufficient evidence to sustain a jury's verdict, the verdict must stand. Nothing in *Gunning* argues against an appellate court's consideration of all of the evidence, so long as all inferences from the evidence are made in support of the verdict. 281 U.S. at 93. The Fifth Circuit in the present case applied the reasonable juror

standard and found that under the evidence, as a matter of law, there was no duty, breach or cause in fact. There is no conflict between *Boeing* and this older authority.

3. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*

This 1962 admiralty case involved a dispute regarding injuries sustained by an employee of Atlantic, which performed stevedoring services for Ellerman. *Atlantic & Gulf*, 369 U.S. at 356. The jury found Ellerman to have been negligent, but found that Ellerman's negligence was not caused by a failure of Atlantic to perform its contractual obligations to Ellerman. The Court of Appeals reversed and entered judgment against Atlantic as well, asserting that the finding against Ellerman as a matter of law necessitated a finding against Atlantic. *Id.* at 358. In reversing and reinstating the jury verdict, this Court recognized the application of the Seventh Amendment and found no conflict in the jury's findings, based upon the law and the evidence. 369 U.S. at 364. A key factor in the decision was the Court of Appeals' failure to attempt to harmonize the jury's findings. This Court noted that searching for an inconsistency where consistency could be found was violative of the Seventh Amendment. *Id.*

Respondent concedes that the Seventh Amendment is a relevant consideration in all actions a United States Court of Appeals takes with regard to a jury finding. However, as noted below, this Court long ago addressed the constitutionality of judgments n.o.v. and directed verdicts, and the reversal of a jury verdict where judgment as a matter of law was appropriate. This is not a case of

allegedly inconsistent jury findings, but rather a case where the jury's findings were unsupported by the evidence. *Atlantic & Gulf* has no direct application to the case at bar. Despite Petitioners' valiant attempts to create one, there is no direct conflict between the *Boeing* standard and the established precedent of this Court. Indeed, *Boeing* is consistent with the logic and reasoning of this Court's most recent review in *Liberty Lobby, see supra* at 16-17.

IV. The Fifth Circuit's Ruling Does Not Result in a Violation of Petitioners' Seventh Amendment Rights.

It is well-settled that when a court grants a directed verdict or a judgment notwithstanding the verdict, the Seventh Amendment right to a jury trial has not been violated. *See, e.g., Galloway v. United States*, 319 U.S. 372, 389 (1943) (concluding that the Seventh Amendment does not deprive the federal courts of their power to enter a directed verdict when the evidence is insufficient as a matter of law); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967) (concluding that there is no Seventh Amendment bar to a district court or a reviewing court granting a judgment notwithstanding the verdict); *Whitsell v. Alexander*, 229 F.2d 47, 49 (7th Cir. 1956) (holding that trial court must grant directed verdict when evidence is such that, as a matter of law, reasonable jurors could not differ; explaining that directed verdicts do not infringe right to jury trial preserved by Seventh Amendment where question is one of law). *See also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979); *Colgrove v. Battin*, 413 U.S. 149, 156 (1973).

In *Galloway*, this Court stated that because of repeated Supreme Court decisions foreclosing this argument for nearly a century, general claims that the Seventh Amendment deprives federal courts of the power to render a directed verdict must fail. 319 U.S. at 389. This Court added that in 1791, the year the Seventh Amendment was ratified, common law rules allowed trial courts to withdraw cases from the jury because of insufficiency of the evidence. *Id.* at 389-90. Additionally, courts could dismiss an action on a party's demurrer on the basis of insufficiency of the evidence. *Id.* Therefore, even in 1791, the Seventh Amendment did not preclude a judge from determining whether evidence was sufficient for submission to the jury. *Id.* at 391.

Rule 50 of the Federal Rules of Civil Procedure provides the authority for federal courts to grant a judgment as a matter of law when there is no "legally sufficient evidentiary basis for a reasonable jury to have found for [the non-moving] party." FED. R. CIV. P. 50(a)(1). It is well-settled that Rule 50 does not violate the Seventh Amendment's guarantee of a jury trial. *Neely*, 386 U.S. at 321; *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *see also Galloway*, 319 U.S. at 389 (stating that the practice of rendering judgments as a matter of law has been explicitly approved by this Court's promulgation of Rule 50).

Petitioners' Seventh Amendment argument is spurious and does not raise a valid constitutional question worthy of review by writ of certiorari.

V. Petitioners' Asserted Error Applies to Only One of the Three Grounds Upon Which the Fifth Circuit Granted ICM Judgment as a Matter of Law and the Other Grounds are a Sufficient Basis for Upholding the Judgment.

Petitioners assert that the Court of Appeals relied upon the testimony of Harshfield for its entire analysis of Petitioners' gross negligence claim against ICM. This grossly misstates the Fifth Circuit's opinion. The Fifth Circuit found no breach of duty as a matter of law and fact, no cause in fact and implicitly recognized lack of foreseeability. Appendix A to Petition for Writ of Certiorari at 14-15 (hereafter "Petitioners' Appendix A").

A. The Court of Appeals' finding that no duty was breached as a matter of law was not based upon Harshfield's testimony.

The Fifth Circuit determined "[a]s a matter of law and fact, there was no breach of duty by ICM." Petitioners' Appendix A at 15. In making its finding of no breach of duty as a matter of law, the Court made specific reference to the fact that Texas law did not require mortgage companies to calculate property appraisals at one hundred percent of market value. Throughout this dispute, Petitioners and their expert, Mozingo, have asserted that because Harshfield did not base his tax escrow estimates on the full purchase price, he somehow violated Texas law and was therefore negligent. Petitioners ignore, as the Court of Appeals did not, that the statute which addresses the use of one hundred percent of market value

to perform tax appraisals is a portion of the Texas Property Tax Code which governs only the actions of governmental appraisal districts[11]. The fact that Petitioners never proved a proper standard of care by mortgage lenders calculating tax escrow estimates was implicit in this portion of the Court of Appeals' discussion. A failure of proof on the proper standard of care entitled ICM to judgment as a matter of law.

The Court of Appeals also noted that Harshfield, a former employee of ICM who at the time of trial had no employment relationship to ICM save as an expert witness, had determined that tax appraisal districts were not appraising properties at one hundred percent of market value. This evidence was not disputed by Petitioners' expert, Mozingo, or any other witness. This discussion was only one independent basis for the finding of no breach of duty as a matter of law, separate and apart from Petitioners' failure to establish or assert the proper standard of care. Further, it appears that this evidentiary discussion related to the Court's dicta reference to no breach of duty "as a matter of fact." Petitioners' Appendix A at 15. The mere fact that dicta is included in an opinion does not render impotent the entire opinion.

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[11] TEX. TAX CODE ANN. § 26.02 (Vernon 1982), dealing with tax appraisals is a portion of the Property Tax Code (TEX. TAX CODE ANN. §§ 1.01-43.04 (Vernon 1982 & Supp. 1992)), which by its own terms governs only the actions of governmental "taxing units." *Id.* § 1.02.

B. The Fifth Circuit's finding of no cause in fact as a matter of law was not based upon Harshfield's testimony.

Contrary to Petitioners' assertion, a review of the Fifth Circuit's discussion of causation reveals no reliance upon Harshfield's testimony. Rather, Judge Barksdale refers to his earlier discussion regarding: (1) the fact that the IQ's themselves established as a matter of law that they could not be used as a predictor, let alone a guarantee, of future taxes, and (2) the fact that the only damages sought related to future tax expenses. Petitioners' Appendix A at 15, referencing 9-14.

Petitioners assert that because *they* believed the IQ's applied to future years, that belief constitutes evidence that the carefully qualified estimates were so intended. Petitioners' convenient interpretation of an unambiguous "estimate" which is "subject to change" is no evidence of ICM's intent in formulating the IQ's. Furthermore, Petitioners are precluded at this late date from asserting that any of their claims rest on the oral statements of Pulte personnel because Petitioners took the position throughout the controversy that the wrong complained of was the IQ tax estimate alone and not any oral representation regarding it. *See* Agreed Statement of the Case, Tr. 10:123.

Petitioners' tortured attempt to show an evidentiary basis for causation is ultimately futile. Despite Mozingo's conclusory opinions to the contrary, the undisputed evidence shows the following facts:

(1) Petitioners' homes were not appraised, or taxed, at their improved value at the time the homes were purchased;

(2) the taxes for the year in which Petitioners bought their homes were lower than the IQ estimates when annualized;

(3) Petitioners' homes were reappraised, just as the Important Notices warned they would be, shortly after the January following the home purchases;

(4) the taxes which exceeded the amounts estimated on the IQ's were the result of those new appraisals; and

(5) the damages sought were all related to those years after reappraisal.

Petitioners' contention that the reappraisals did *not* cause taxes to increase is logically ludicrous and without evidentiary support. The Fifth Circuit's ruling on the issue of causation was based upon the Petitioners' failure to present any credible evidence that ICM's actions caused the injuries complained of, not upon the Court's review of the testimony of Harshfield. Petitioners' lengthy argument regarding consideration of the evidence and the Seventh Amendment is irrelevant, as any such error with regard to the "duty" aspect of negligence would be harmless. Again, this alone justifies denial of the writ.

C. The Fifth Circuit's implicit finding of no foreseeability as a matter of law was not based on the testimony of Harshfield.

The Fifth Circuit recognized that under Texas law there are two elements to causation in a negligence action – cause in fact and foreseeability. Petitioners' Appendix A at 15. The Fifth Circuit addressed not only cause in fact, but foreseeability as well. The Court of Appeals noted the

uncontradicted evidence that ICM provided and the Petitioners each received and signed the Important Notices regarding future taxes at each real estate closing. *Id.* at 15. Texas substantive law requires that parties are charged with notice of the contents of the documents they sign and agreements they execute. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). The Court of Appeals' notation that, "ICM made clear at closing, through its Important Notice, that 'at the beginning of next year, your property will be reevaluated and your taxes computed on that reevaluation,' " Petitioners' Appendix A at 15, was an implicit recognition that ICM rendered any reliance by Petitioners upon the tax estimates in future years not foreseeable and unreasonable as a matter of law.

Again, this holding is not based upon the testimony of Harshfield, but upon the unambiguous terms of the Important Notices, undisputed facts and the law of Texas. Like the cause in fact ruling, this implicit holding is unassailed by Petitioners' arguments regarding improper review of the record and the Seventh Amendment and constitutes yet another independent ground for denial of the writ.

CONCLUSION

For the foregoing reasons, there is no valid reason to grant the Petition. The Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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APPENDIX A

Excerpt from Brief of Appellee, p. 25

Because of the Constitutional right to a jury trial guaranteed by the Seventh Amendment, appellate review of a sufficiency of the evidence point is exceedingly narrow; the verdict must be upheld unless the facts and inferences point so strongly in favor of the Appellants that reasonable minds could not arrive at a contrary verdict. *Granberry v. O'Barr,* 866 F.2d 112, 113 (5th Cir. 1988) [citations omitted].

In reviewing the evidence to apply this standard, the Court must consider all the evidence and draw all reasonable inferences in favor of the Appellees, and:

> If there is an evidentiary basis upon which the verdict can be supported, the jury's determinations will be left undisturbed, even where there is substantial evidence that could have supported an opposite verdict.

Gibralter Savings v. L. D. Brinkman, 860 F.2d 1275, 1297 (5th Cir. 1988).

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APPENDIX B

Excerpt from Appellee's Petition for Rehearing, p. 4

In its Opinion, the Court initially recognizes the "exacting" standard of appellate review such that a jury verdict may be reversed only where "the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary." Slip Op. at 1919 [citations omitted]. However, the Court disregards the corollary rule that, if there is evidence of such quality and weight that reasonable men might reach different conclusions, the Court may not invade the jury's fact-finding function. *Cranberry* [sic] *v. O'Bair* [sic], 866 F.2d 112, 113 (5th Cir. 1988). The Court also contradicts established principles in applying these standards by failing to consider *all* of the evidence or to do so "in the light and with all reasonable inferences most favorable to [the Homeowners]." *Boeing*, 411 F.2d at 374 [citations omitted]. So long as there is conflicting evidence to create a jury question, the jury's findings must be affirmed. *Boeing*, 411 F.2d at 375.

* * *